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In the Supreme Court of the United States

OCTOBER TERM, 1982

CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED

and

THE OPTIONS CLEARING CORPORATION,
Petitioners,

v.

BOARD OF TRADE OF THE CITY OF CHICAGO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (SEVENTH CIRCUIT NOS. 81-1660, 81-2587)

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QUESTIONS PRESENTED

1. Are standardized securities options (i.e., options to purchase or sell a specified underlying security) which are widely offered and sold to the public through prospectuses and traded on national securities exchanges subject to regulation by the Securities and Exchange Commission under the federal securities laws?

2. If so, are such options subject to the exclusive jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act whenever the underlying securities are the subject of futures contracts traded on a commodity board of trade?

LIST OF PARTIES

This petition involves two companion cases, Nos. 81-1660 and 81-2587, in the United States Court of Appeals for the Seventh Circuit. The Board of Trade of the City of Chicago was the petitioner and the Securities and Exchange Commission was the respondent in both cases below. The Chicago Board Options Exchange, Incorporated intervened as a respondent in both cases below and The Options Clearing Corporation intervened as a respondent in No. 81-2587.*

The Board of Governors of the Federal Reserve System, the Securities Investor Protection Corporation, the North American Securities Administrators Association, the American Stock Exchange and the Philadelphia Stock Exchange filed briefs as *amici curiae* in No. 81-1660 in support of the respondents below. The Commodity Futures Trading Commission participated as *amicus curiae* in No. 81-1660 in support of the petitioner below.

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* Pursuant to Rule 28.1 of the Rules of this Court, the Chicago Board Options Exchange, Incorporated and The Options Clearing Corporation state that they have no parent companies, subsidiaries (other than wholly owned subsidiaries) or affiliates. Stock in The Options Clearing Corporation is owned in equal shares by the Chicago Board Options Exchange, Incorporated, the American Stock Exchange, Inc., the Philadelphia Stock Exchange, Inc. and the Pacific Stock Exchange Incorporated.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
List of Parties	i
Table of Contents	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutes and Regulation Involved	2
Statement of the Case	2
Decisions of the Court Below	6
Reasons for Granting the Writ	8
I. It Is Important that This Court Determine Which of Two Different Federal Regulatory Schemes Applies to New Types of Securities Options	8
II. The Court of Appeals Holding that Options Are Not Securities Will Severely Disrupt the Established Regulatory Scheme Pertaining to Securities Options, Is Inconsistent with the Holdings of This Court and Other Courts and Will Create a Substantial Regulatory Gap	13
III. Instead of Drawing the Clear and Simple Jurisdictional Line Intended by Congress, the Court of Appeals Holding Fashions an Ambiguous and Uncertain Jurisdictional Test that Needlessly Requires an Ad Hoc Determination of Jurisdiction in Virtually Every Future Case	17
Conclusion	22

PAGE

Appendix

Opinion of the Court of Appeals for the Seventh Circuit, No. 81-1660 (March 24, 1982) A-1

Order of the Court of Appeals for the Seventh Circuit, No. 81-2587 (March 24, 1982) B-1

Order of the Securities and Exchange Commission under review in No. 81-1660 (February 26, 1981) C-1

Order of the Securities and Exchange Commission under review in No. 81-2587 (August 6, 1981) .. D-1

Judgment of the Court of Appeals for the Seventh Circuit, No. 81-1660 (March 24, 1982) E-1

Judgment of the Court of Appeals for the Seventh Circuit, No. 81-2587 (March 24, 1982) F-1

Order of the Court of Appeals for the Seventh Circuit denying petitions for rehearing, Nos. 81-1660, 81-2587 (May 27, 1982) G-1

Statutes and Regulation Involved H-1

Commodity Exchange Act, as amended, 7 U.S.C. §§1-24(1976):

Sec. 2(a)(1), 7 U.S.C. §2 (1976) H-1

Sec. 4c, 7 U.S.C. §6c (1976 and Supp. II 1978) H-2

Securities Exchange Act of 1934, as amended, 15 U.S.C. §§78a-78kk (1976):

Sec. 3(a), 15 U.S.C. §78c(a) (1976) H-4

Sec. 5, 15 U.S.C. §78e (1976) H-7

Sec. 6(b), 15 U.S.C. §78f(b) (1976) H-7

Sec. 9, 15 U.S.C §78i (1976) H-8

Sec. 17A(b), 15 U.S.C. §78q-1(b) (1976) H-9

Sec. 19, 15 U.S.C. §78s (1976) H-10

Sec. 25(a), 15 U.S.C. §78y(a) (1976) H-12

Securities Investor Protection Act of 1970, as amended, 15 U.S.C. §§78aaa-78*lll*:

Sec. 16, 15 U.S.C §78*lll* H-13

Rules and Regulations Under the Securities Exchange Act of 1934:

Rule 3a11-1, 17 C.F.R. §240.3a11-1 (1981) ... H-14

TABLE OF AUTHORITIES

Cases PAGE

In Re McDonnell Douglas Corp. Securities Litigation, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶98,737 (E.D. Mo. 1982) 15

Lloyd v. Industrial Bio-Test Laboratories, Inc., 454 F. Supp. 807 (S.D.N.Y. 1978) 15

LTV Federal Credit Union v. UMIC Government Securities, Inc., 523 F. Supp. 819 (N.D. Tex. 1981) 15

Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017 (6th Cir. 1979) 15

Marine Bank v. Weaver, U.S. , 102 S.Ct. 1220 (1982) 14,15

Miller v. General Outdoor Advertising Co., 223 F. Supp. 790 (S.D.N.Y. 1963), *rev'd on other grounds*, 337 F.2d 944 (2d Cir. 1964) 15

Savino v. E.F. Hutton & Co., 507 F. Supp. 1225 (S.D.N.Y. 1981) 15

SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943) 14

SEC v. United Benefit Life Insurance Co., 387 U.S. 202 (1967) 14

SEC v. W.J. Howey Co., 328 U.S. 293 (1946) 14

Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6 (1971) 4

Tcherepnin v. Knight, 389 U.S. 332 (1967) 14

Vogel-Lorber, Inc. v. Options on Shares Inc., [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,911 (S.D.N.Y. 1974) 15

Statutes PAGE

Commodity Exchange Act, as amended, 7 U.S.C. §§1-24 ..... *passim*

Commodity Exchange Act, as amended:

Sec. 2(a)(1), 7 U.S.C. §2 ..... *passim*

Sec. 4c, 7 U.S.C. §6c 2

Sec. 5a(12), 7 U.S.C. §7a(12) 10

Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 6

Securities Act of 1933, as amended, 15 U.S.C. §§77a-77aa 3,14

Securities Exchange Act of 1934, as amended, 15 U.S.C. §§78a-78kk ..... *passim*

Securities Exchange Act of 1934, as amended:

Sec. 3(a), 15 U.S.C. §78c(a) 2

Sec. 3(a)(10), 15 U.S.C. §78c(a)(10) 3,14,15

Sec. 3(a)(12), 15 U.S.C. §78c(a)(12) 4

Sec. 5, 15 U.S.C. §78e 2

Sec. 6, 15 U.S.C. §78f 2,5

Sec. 6(b), 15 U.S.C. §78f(b) 2

Sec. 7, 15 U.S.C. §78g 10

Sec. 9, 15 U.S.C. §78i 2,13

Sec. 9(b), 15 U.S.C. §78i(b) 16

Sec. 9(c), 15 U.S.C. §78i(c) 16

Sec. 11(b), 15 U.S.C. §78k(b) 14

Sec. 17A(b), 15 U.S.C. §78q-1(b) 2,3,5

Sec. 19(b), 15 U.S.C. §78s(b) 2,4,5

Sec. 25(a), 15 U.S.C. §78y(a) 2,5

Sec. 28(a), 15 U.S.C. §78bb(a) 11

PAGE

Securities Investor Protection Act of 1970, as amended, §§78aaa-78*lll* 2

Securities Investor Protection Act, as amended:

Sec. 16(14), 15 U.S.C. §78*lll*(14) 2

28 U.S.C. §1254(1) 2

Legislative Materials

120 Cong. Rec. 34737 (1974) 21

120 Cong. Rec. 34997 (1974) 21

H.R. Rep. No. 975, 93d Cong., 2d Sess. (1974) 20

H.R. Rep. No. 565, 97th Cong., 2d Sess. (1982) 6

H.R. Rep. No. 626, 97th Cong., 2d Sess. (1982) 6,16

S. Rep. No. 1131, 93d Cong., 2d Sess. (1974) 19

S. Rep. No. 384, 97th Cong., 2d Sess. (1982) 6

S. Rep. No. 390, 97th Cong., 2d Sess. (1982) 6,16

Regulations

FRB Regulation T, §3(i), 12 C.F.R. §220.3(i) 10,14

SEC Rule 3a11-1, 17 C.F.R. §240.3a11-1 2,14

Other

46 Fed. Reg. 15242 (1981) 2

46 Fed. Reg. 40849 (1981) 2

46 Fed. Reg. 54500 (1981) 18

Johnson, *The Commodity Futures Trading Commission Act: Preemption As Public Policy*, 29 Vand. L. Rev. 1 (1976) 18,20

PAGE

1 L. Loss, *Securities Regulation* 469 (2d ed. 1961) . 16

Sec. Ex. Act Rel. No. 15575, 44 Fed. Reg. 11876 (1979) 11

Sec. Ex. Act Rel. No. 16696, 45 Fed. Reg. 21420 (1980) 11

Sec. Ex. Act Rel. No. 17574, 46 Fed. Reg. 15134 (1981) 14

Sec. Ex. Act Rel. No. 17638 (March 18, 1981), 22 SEC Docket 484, *reprinted in* [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶82,850 14

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CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED
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THE OPTIONS CLEARING CORPORATION,
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v.

BOARD OF TRADE OF THE CITY OF CHICAGO,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Chicago Board Options Exchange, Incorporated and The Options Clearing Corporation respectfully request that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit entered on March 24, 1982, in two companion cases (Nos. 81-1660 and 81-2587).

OPINIONS BELOW

The opinion of the Court of Appeals in No. 81-1660, which is reproduced in the Appendix beginning at page A-1, is reported at 677 F.2d 1137 (7th Cir. 1982). The order of the Court of Appeals in No. 81-2587, which appears in the Appendix beginning at page B-1, is not reported. The order of the Securities and Exchange Commission ("SEC") which was the subject of review in No. 81-1660 appears in the Appendix beginning at page C-1 and is published at 46

Fed. Reg. 15242 (1981). The order of the SEC which was the subject of review in No. 81-2587 appears in the Appendix beginning at page D-1 and is published at 46 Fed. Reg. 40849 (1981).

JURISDICTION

The judgments of the Court of Appeals, which are reproduced in the Appendix at pages E-1 (No. 81-1660) and F-1 (No. 81-2587), were entered on March 24, 1982. The order denying the timely petitions for rehearing in both cases, which is reproduced at page G-1 of the Appendix, was entered on May 27, 1982. This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATION INVOLVED

This case involves Sections 2(a)(1) and 4c of the Commodity Exchange Act, as amended (the "CEA"), 7 U.S.C. §§2, 6c; Sections 3(a), 5, 6(b), 9, 17A(b), 19(b) and 25(a) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), 15 U.S.C. §§78c(a), 78e, 78f(b), 78i, 78q-1(b), 78s(b) and 78y(a); Section 16(14) of the Securities Investor Protection Act of 1970, as amended, 15 U.S.C. §78*lll*(14); and Securities and Exchange Commission Rule 3a11-1, 17 C.F.R. §240.3a11-1. The pertinent portions of the text of these statutes and regulation are set forth in the Appendix beginning at page H-1.

STATEMENT OF THE CASE

Petitioner Chicago Board Options Exchange, Incorporated ("CBOE") was organized in 1972 as the nation's first exchange market for trading in securities options. In 1973 CBOE was registered as a national securities exchange by an order entered by the SEC pursuant to Section 6 of the Exchange Act, 15 U.S.C. §78f. Since that time, CBOE has continuously maintained an exchange market for options to purchase and sell underlying common stocks and has consistently been treated and regulated as a securities exchange.

All of the options which are traded on CBOE, as well as the options which are traded on three other national securities exchanges,[1] are issued by petitioner The Options Clearing Corporation ("OCC")[2] and are publicly offered and sold to the public through prospectuses as registered securities under the provisions of the Securities Act of 1933, 15 U.S.C. §§77a-77aa.[3] OCC has responsibility for the settlement of all transactions in options which are effected on national securities exchanges and is registered with the SEC as a securities clearing agency pursuant to the provisions of Section 17A of the Exchange Act, 15 U.S.C. §78q-1.

The Government National Mortgage Association, which is a Government corporation within the Department of Housing and Urban Development, administers a program for mortgage-backed securities that is designed to increase liquidity in the secondary mortgage market and attract private sources of funds into residential loans. Under this program, these securities ("GNMA securities" or "GNMAs") are issued by private institutions, are secured by pools of mortgages and are guaranteed as to the timely payment of principal and interest by the Government National Mortgage Association. It is undisputed that GNMA securities, which are traded in the over-the-counter market and also on the Philadelphia Stock Exchange, are "securities" as defined in Section 3(a)(10)

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[1] Securities options are now traded on the American Stock Exchange, the Philadelphia Stock Exchange and the Pacific Stock Exchange as well as on CBOE.

[2] Every OCC option gives the holder the right to purchase from OCC (in the case of a call option), or to sell to OCC (in the case of a put option), a specified quantity of an underlying security at a fixed exercise price and before a fixed expiration date. All the terms of OCC options are standardized except the prices at which they are purchased and sold on the exchanges.

[3] More than two million copies of OCC's current options prospectus have been distributed since October, 1981.

of the Exchange Act, 15 U.S.C. §78c(a)(10).[4] GNMA securities are also the subject of contracts of sale for future delivery ("futures contracts") which are traded on the Board of Trade of the City of Chicago ("CBT") and are, therefore, "commodities" as defined in Section 2(a)(1) of the CEA, 7 U.S.C. §2.[5]

On April 17, 1980, CBOE filed with the SEC, pursuant to Section 19(b) of the Exchange Act, 15 U.S.C. §78s(b), proposed modifications to its existing options rules so as to provide for the trading on CBOE of options to purchase and sell GNMA securities. In response to its invitation for public comments, the SEC received 85 comment letters, including comments from a number of interested Government agencies—the Government National Mortgage Association, the Department of Housing and Urban Development, the Department of the Treasury, the Federal Reserve Bank of New York, the Board of Governors of the Federal Reserve System ("FRB") and the Commodity Futures Trading Commission ("CFTC"). The comments were generally supportive of CBOE's proposal and urged its prompt approval. They observed that CBOE's proposed GNMA options market would serve needs that were not currently filled by CBT's GNMA futures market and that it would greatly enhance the regulatory environment for trading of GNMA options and would be

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[4] Because GNMA securities are guaranteed by a Government corporation, they are also "exempted securities" as defined in Section 3(a)(12) of the Exchange Act, 15 U.S.C. §78c(a)(12). Although certain provisions of the Exchange Act do not apply to exempted securities, other provisions—including those which authorize the SEC to regulate national securities exchanges—apply to *any* securities, whether or not they are exempted securities. *See Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 10 & n.6 (1971).

[5] The word "commodity" is defined in the CEA as including "all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." Section 2(a)(1) of the CEA, 7 U.S.C. §2. A futures contract is a legally binding commitment to deliver or to receive a specified quantity and grade of a commodity during a designated month at a price that is determined in a transaction effected on a commodity board of trade.

likely to cure abuses that had been found in the existing market. The only negative comments were submitted by CBT, which argued that the CFTC had been granted exclusive or concurrent jurisdiction under the CEA to regulate options to purchase and sell securities such as GNMAs which had become "commodities" under the CEA.

On February 26, 1981, the SEC entered an order approving CBOE's proposed rules, finding them to be "consistent with the requirements of the [Exchange] Act and the rules and regulations thereunder and, in particular, the requirements of Section 6." (App. C-15).

On February 20, 1981, OCC filed with the SEC, pursuant to Section 19(b) of the Exchange Act, proposed rules that would provide for the issuance and clearance of GNMA options in the same general way that OCC's existing rules provided for the issuance and clearance of stock options. CBT again submitted comments questioning the SEC's jurisdiction. On August 6, 1981, the SEC entered an order approving OCC's rules, finding them to be "consistent with the requirements of the [Exchange] Act and the rules and regulations thereunder applicable to registered clearing agencies, and, in particular, the requirements of Section 17A." (App. D-12). OCC also filed with the SEC pursuant to the Securities Act of 1933 a supplement covering GNMA options as part of its current options prospectus, and the prospectus (including the GNMA options supplement) was declared effective by the SEC on October 30, 1981.

Pursuant to Section 25(a) of the Exchange Act, 15 U.S.C. §78y(a), CBT filed petitions to review the SEC orders which had approved the proposed rules of CBOE (No. 81-1660) and OCC (No. 81-2587).[6]

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[6] A third related case was instituted in the Court of Appeals for the Seventh Circuit by CBT and the Chicago Mercantile Exchange to review an SEC order which had approved rules of CBOE and the American Stock Exchange proposing trading on those exchanges of options on securities issued by the United States Department of the Treasury. The case (No. 82-1097) is awaiting further action by the Court of Appeals.

After No. 81-1660 had been fully briefed and argued, the SEC and the CFTC reached an agreement as to the scope of their respective jurisdictions. The agreement recognized "the SEC as the sole federal regulator of the securities options markets," including options on exempted securities such as GNMAs, and the CFTC as having no authority to regulate such options. Although the agencies agreed to the immediate implementation of the agreement, legislation was introduced in both houses of Congress to codify the agreement. This legislation has been favorably reported by the appropriate Congressional committees.[7]

Decisions Of The Court Below

On March 24, 1982, a sharply divided panel of the Court of Appeals rendered the opinions now sought to be reviewed. The majority in No. 81-1660 (consisting of Chief Judge Cummings and Senior District Judge Campbell) focused initially on the interplay between two jurisdictional provisions of Section 2(a)(1) of the CEA, 7 U.S.C. §2, that were added by the 1974 amendments to the CEA.[8] One of these provisions (the so-called "exclusive jurisdiction clause") granted the CFTC "exclusive jurisdiction with respect to accounts, agreements (including ... an 'option' ...), and transactions involving contracts of sale of a commodity for future delivery ...." The other (the so-called "SEC savings clause") preserved all jurisdiction of the SEC except to the extent of the jurisdiction granted to the CFTC in the exclusive

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[7] *See* H.R. Rep. No. 626, 97th Cong., 2d Sess. Part 1 at 6-9 (House Committee on Energy and Commerce) and Part 2 at 4-5 (House Committee on Agriculture) (1982); H.R. Rep. No. 565, 97th Cong., 2d Sess. Part 1 at 38-40 (House Committee on Agriculture) and Part 2 at 17 (House Committee on Energy and Commerce) (1982); S. Rep. No. 390, 97th Cong., 2d Sess. 5 (1982) (Senate Committee on Banking, Housing, and Urban Affairs); S. Rep. No. 384, 97th Cong., 2d Sess. 20 (1982) (Senate Committee on Agriculture, Nutrition, and Forestry).

[8] Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389.

jurisdiction clause. Reading these two provisions together, the Court of Appeals majority held that the CFTC had exclusive jurisdiction, and the SEC no jurisdiction, to regulate options on GNMA securities. It read the word "involving" in the exclusive jurisdiction clause as broadly meaning "relating to" any futures contract for a commodity (including a commodity that was also a security) (App. A-17–A-21), and it noted that GNMA options and the GNMA futures contracts traded on CBT are both "claimed to serve more or less the same purposes, and the prices in each market *assumedly* would affect one another" in determining that the options "involved" the futures. (App. A-29–A-32; emphasis added).

The majority also held that another provision of Section 2(a)(1) of the CEA (the so-called "Treasury amendment"), which explicitly provides that the CEA is not to be applicable to transactions in "security rights," "government securities" and "mortgage purchase commitments," does not apply to transactions in GNMA options. (App. A-34–A-36).

The majority further held that options to purchase and sell securities are not themselves securities under the federal securities laws and that the SEC has no jurisdiction under those laws to regulate the trading on national securities exchanges of options on exempted securities such as GNMAs. (App. A-37–A-49). On the basis of these holdings, the Court of Appeals set aside the SEC order that had approved CBOE's GNMA options rules. (App. A-50).

The dissenting opinion of Circuit Judge Cudahy took sharp issue with the holdings and reasoning of the majority, stating that the majority opinion

> fails at almost every turn to meet the tests of plain language, congressional intent, historical context and practical result. The opinion throws into disarray the agreement just reached between the CFTC and the SEC which would allow GNMA options trading to go forward forthwith on the CBOE. By reaching the extreme conclu-

> sion that the Securities Exchange Commission is without power under its own statutes to regulate options trading in what is incontestably a "security" —GNMA's—, the majority seems to have returned all parties to "square one" in this unseemly regulatory debacle.

(App. A-66). Specifically, the dissent concluded that the exclusive jurisdiction clause in the CEA applies only to options to purchase or sell futures contracts and not to options to purchase or sell securities (App. A-66–A-85), that GNMA options are excluded from the reach of the CEA by the "plain language" of the Treasury amendment (App. A-85–A-88), and that options to purchase or sell securities are themselves securities under the federal securities laws and are plainly subject to the SEC's regulatory jurisdiction (App. A-89–A-95).

On March 24, 1982, the Court of Appeals also entered its order in No. 81-2587. (App. B-1). The same majority found that there were no significant differences between the two cases. It held that the CFTC has exclusive jurisdiction under the CEA with respect to GNMA options and that the SEC has no jurisdiction under the securities laws to regulate the issuance and clearance by a registered clearing agency of options on exempted securities. Accordingly, it set aside the SEC's order approving OCC's rules on the basis of its opinion in No. 81-1660. Judge Cudahy dissented for the reasons set forth in his dissenting opinion in No. 81-1660.

REASONS FOR GRANTING THE WRIT

I.

IT IS IMPORTANT THAT THIS COURT DETERMINE WHICH OF TWO DIFFERENT FEDERAL REGULATORY SCHEMES APPLIES TO NEW TYPES OF SECURITIES OPTIONS.

This case presents, as a matter of first impression, a fundamental jurisdictional question under two different statutory schemes (the federal securities laws and the CEA)

that is of vital importance to the development and regulation of the trading markets for a growing number of new types of securities options. The resolution of this question not only will determine which federal agency has regulatory authority over these options, but it will also determine the type of market in which they may be traded under existing federal law, the manner in which professional participants in those markets are regulated, and the nature and extent of the statutory protections that have been extended by Congress to public investors.

During the past ten years, new types of securities options designed to reduce investors' economic risks and to increase their investment flexibility have been developed by national securities exchanges. These options, which were first introduced in 1973 when trading began on CBOE in options to purchase 16 underlying stocks, have grown enormously in public acceptance and in their importance to the securities industry. There are now four national securities exchanges on which options on more than 360 stocks are traded. During 1981, transactions in over 100 million option contracts (representing the right to purchase or sell more than 10 billion shares of stock) were effected on these four exchanges at an aggregate price in excess of $40 billion. CBOE and other national securities exchanges also have filed proposals with the SEC to provide for exchange trading of options on a number of other securities—not only the options on GNMA securities that are the subject of this case, but also options on securities issued by the Department of the Treasury, on groups of common stocks and on indices of common stock prices.[9]

During this same ten-year period, commodity boards of trade, which had formerly traded only contracts of sale for future delivery of agricultural commodities and metals, have begun to trade futures contracts on various financial instru-

[9] All of these proposed options are to be issued by OCC and sold in the same manner as OCC stock options have been issued and sold since 1973.

ments, including GNMA securities, certain Treasury securities and certain stock indices. They also have proposals pending with the CFTC to trade futures contracts on prices of common stock groups and on AT&T corporate bonds.

The development by the commodity boards of trade of these new futures contracts on securities has blurred the line between commodities and securities and has thereby presented questions as to which federal statutory scheme is applicable to—and which federal agency (the SEC or the CFTC) has been vested with jurisdiction to regulate—the trading of options to purchase or sell a security that becomes a "commodity" under the CEA. Since the word "commodity" is now defined in the CEA to include "all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in," when an instrument which is indisputably a "security" under the federal securities laws—e.g., a GNMA security, a Treasury bond or an AT&T corporate bond—becomes the subject of a futures contract traded on a board of trade, then that security also literally becomes a "commodity" under the CEA.

Whether options on these securities are subject to regulation by the SEC or CFTC is not simply a "turf" battle between two federal agencies. Rather, the resolution of this question will determine which of two distinct sets of regulatory protections is available to public investors. For example, if securities options are securities subject to regulation under the securities laws, then public investors are entitled to the benefit of a number of regulatory safeguards: the regulation of public offerings and sales under the Securities Act of 1933, the margin regulations of the FRB,[10] the regulatory protec-

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[10] *See* Section 7 of the Exchange Act, 15 U.S.C. §78g, and Section 3(i) of FRB Regulation T, 12 C.F.R. §220.3(i). In contrast, the CFTC has no authority to set levels of margin for commodity futures contracts under Section 5a(12) of the CEA, 7 U.S.C. §7a(12).

tions of the state securities laws,[11] the established pervasive scheme for regulation of securities options sales practices that has been imposed by the SEC on the national securities exchanges and broker-dealers,[12] and the insurance protections afforded by the Securities Investor Protection Act of 1970, as amended, 15 U.S.C. §§78aaa-78*lll*, in the event of a securities broker's insolvency. If, however, the transformation of the securities underlying these options into a "commodity" causes the options to become subject to the exclusive jurisdiction of the CFTC under the CEA, then these safeguards are not available to public investors. We do not believe Congress ever intended these profound results. Thus, this Court's determination as to the choice of regulatory scheme intended by Congress is a matter of great importance to public investors in securities options.

Moreover, the uncertainty as to which regulatory scheme is applicable has left securities exchanges in a quandary. An exchange that wishes to become a market for the trading of options on an instrument that is both a security and a commodity cannot be sure with which federal agency it should file for approval, and the agencies themselves do not know whether they should process the filings.[13] This jurisdictional confusion has thus continued to delay the introduction

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[11] Section 28(a) of the Exchange Act, 15 U.S.C. §78bb(a), expressly preserves the jurisdiction of state securities laws insofar as they do not conflict with the provisions of the Exchange Act. In contrast, state regulatory laws are totally preempted with respect to matters that are within the exclusive jurisdiction granted to the CFTC under Section 2(a)(1) of the CEA, 7 U.S.C. §2.

[12] *See, e.g.*, Sec. Ex. Act Rel. No. 15575, 44 Fed. Reg. 11876 (1979) (requiring securities options exchanges to adopt new sales practice rules before any new options listings would be permitted); Sec. Ex. Act Rel. No. 16696, 45 Fed. Reg. 21420 (1980) (approving the new rules).

[13] Under the decision of the Court of Appeals, even the mutual agreement of the agencies would not assure an exchange that it has chosen the right agency. (App. A-9 n.8; A-65; A-98).

of new securities options that would serve important economic purposes.

The unfilled need for exchange-traded GNMA options illustrates the problem. Although the record before the SEC in this case establishes that GNMA options are urgently needed by mortgage bankers in order to enhance their ability to finance residential construction, trading in GNMA options has been thwarted by the jurisdictional questions presented by this litigation. Similarly, the pending proposals of national securities exchanges for options on Treasury securities and on stock indices are in limbo as a result of the jurisdictional uncertainties. And, even if one agency should approve a particular proposal, until the questions presented by this case are settled by this Court, no exchange, no clearing agency, and no broker-dealer can be confident that its actions in accordance with one federal statutory scheme will not be held to be in violation of the other.

Unfortunately, the decisions of the Court of Appeals have created more jurisdictional uncertainties than they have resolved. As noted in Part II below, the Court of Appeals' erroneous holding that securities options are not securities casts doubt upon, and severely disrupts, the existing basis for regulation of the securities options markets. It results in a limitation of the powers which have long been exercised by the SEC and the FRB to regulate transactions in securities options, and it creates a gap in the regulation of options on exempted securities. And, as noted in Part III below, the Court of Appeals holding creates uncertainty as to whether the CEA or the Exchange Act applies to options on any security (other than GNMAs) which becomes a "commodity." If the Court of Appeals opinions are left to stand, the fundamental jurisdictional questions presented in these cases will have to be relitigated on an *ad hoc* basis in respect of options on virtually every other security which is, or which may become, the subject of futures trading in order to determine which statutory scheme applies.

II.

THE COURT OF APPEALS HOLDING THAT OPTIONS ARE NOT SECURITIES WILL SEVERELY DISRUPT THE ESTABLISHED REGULATORY SCHEME PERTAINING TO SECURITIES OPTIONS, IS INCONSISTENT WITH THE HOLDINGS OF THIS COURT AND OTHER COURTS AND WILL CREATE A SUBSTANTIAL REGULATORY GAP.

The Court of Appeals majority held that securities options are not themselves securities within the meaning of the securities laws and that the SEC therefore lacks jurisdiction under the securities laws to regulate options on exempted securities.[14] (App. A-37–A-49). If allowed to stand, this holding would seriously disrupt the established regulatory scheme pertaining to options on all securities, including the stock options that are currently traded on four national securities exchanges, whether or not such securities now are or ever become commodities.

Options of the type traded on CBOE and issued by OCC have, from their inception, been regarded by investors, professionals and regulators to be securities. They have been widely offered and sold as securities to the general public through prospectuses; they have been traded as securities on national securities exchanges; they are instruments having equivalent values in which there is common trading; their prices are widely reported by securities information processors; orders for their purchase and sale are transmitted through securities broker-dealers and executed in the same fashion as for other securities; and they are standardized, transferable and hypothecatable instruments.

Securities options have, moreover, long and consistently been treated as securities by the responsible federal agen-

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[14] The majority held that the SEC's authority to regulate options stems solely from Section 9 of the Exchange Act, 15 U.S.C. §78i (which, it held, does not apply to options on exempted securities). (App. A-46–A-48).

cies. Since 1973 they have been registered as securities under the provisions of the Securities Act of 1933 and the Exchange Act; they have been included within the SEC's definition of "equity securities" in SEC Rule 3a11-1, 17 C.F.R. §240.3a11-1; they are subject to the transaction reporting rules of the SEC;[15] options specialists are subject to regulation under Section 11(b) of the Exchange Act, 15 U.S.C. §78k(b);[16] and options have been treated as securities by the FRB for purposes of setting margin requirements under Regulation T, 12 C.F.R. §220.3(i). In short, a securities option issued by OCC and traded on national securities exchanges is clearly an instrument "commonly known as a 'security'" and therefore falls within the statutory definition of "security." Section 3(a)(10) of the Exchange Act, 15 U.S.C. §78c(a)(10).

The Court of Appeals holding thus ignores the repeated teachings of this Court that the definition of security in the securities laws was meant to include "the many types of instruments that in our commercial world fall within the ordinary concept of a security" and that the test of a security "is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect." *Marine Bank v. Weaver*, U.S. , 102 S.Ct. 1220, 1223 (1982). *Accord, Tcherepnin v. Knight*, 389 U.S. 332, 338 n.19 (1967); *SEC v. United Benefit Life Insurance Co.*, 387 U.S. 202, 211 (1967); *SEC v. W. J. Howey Co.*, 328 U.S. 293, 299 (1946); *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 352-53 (1943). In prior decisions in which this Court has found instruments to be securities under the securities laws, it has attached considerable weight to the fact that the instruments were offered to a number of potential investors, that there had been "common trading" in the instruments, that the instruments "had equivalent values to most persons and could have

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[15] *See* Sec. Ex. Act Rel. No. 17638 (March 18, 1981), 22 SEC Docket 484, *reprinted in* [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶82,850.

[16] *See* Sec. Ex. Act Rel. No. 17574, 46 Fed. Reg. 15134 (1981).

been traded publicly," and that the instruments had been publicly offered to potential investors through a prospectus. *Marine Bank v. Weaver*, 102 S.Ct. at 1225. Although all of these factors apply to securities options issued by OCC, the majority below considered none of them. The odd result is that an instrument which has been uniformly deemed to be a security by those responsible for it—its issuer, the broker-dealers who sell it, the exchanges where it is traded, the SEC and the FRB—is held not to be a security upon the petition of a person (the CBT) which is essentially a stranger to transactions in options.[17]

The holding below also conflicts with the Sixth Circuit's decision in *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017 (6th Cir. 1979), which expressly held that the definition of "security" in Section 3(a)(10) of the Exchange Act, 15 U.S.C. §78c(a)(10), includes exchange-traded options to purchase or sell stock. *Id.* at 1026 n.40. Further, it is in conflict with the holdings of most district courts which have decided this issue,[18] with recent statements by the Congressional committees having oversight over the administration of the

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[17] In its comments to the SEC with respect to CBOE's proposed rules, CBT assumed that (absent the provisions of the CEA) the SEC had jurisdiction under the securities laws. It was not until it filed comments with respect to OCC's rules that CBT first argued that the SEC did not have jurisdiction under the securities laws over options on exempted securities.

[18] *See, e.g., In Re McDonnell Douglas Corp. Securities Litigation*, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶98,737 at 93,723 (E.D. Mo. June 22, 1982); *Savino v. E.F. Hutton & Co.*, 507 F. Supp. 1225, 1235 (S.D.N.Y. 1981); *Lloyd v. Industrial Bio-Test Laboratories, Inc.*, 454 F. Supp. 807, 811 (S.D.N.Y. 1978); *Vogel-Lorber, Inc. v. Options on Shares Inc.*, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,911 at 97,109 (S.D.N.Y. 1974). In contrast, the only cases involving options on securities cited in the decision below are inapposite because the options in those cases were privately negotiated agreements rather than publicly traded instruments. *See LTV Federal Credit Union v. UMIC Government Securities, Inc.*, 523 F. Supp. 819 (N.D.Tex. 1981); *Miller v. General Outdoor Advertising Co.*, 223 F. Supp. 790 (S.D.N.Y. 1963), *rev'd. on other grounds*, 337 F.2d 944 (2d Cir. 1964).

federal securities laws[19] and with the leading securities law treatise.[20]

The holding that options are not securities does not, of course, strip the SEC of all regulatory authority over options on non-exempted securities. *See* Sections 9(b) and 9(c) of the Exchange Act, 15 U.S.C. §78i(b)-(c). Nevertheless, if options are not themselves securities, a number of important statutory provisions—including the entire Securities Act of 1933, the margin regulations of the FRB, the regulation of OCC as a registered clearing agency and of CBOE as a national securities exchange, and the regulation of broker-dealers who deal solely in options—will either not apply at all or will be severely limited in their application.

Finally, if securities options are held not to be securities, a regulatory gap will exist with respect to options on

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[19] In its report recommending enactment of legislation to implement the SEC-CFTC jurisdictional agreement, the House Committee on Energy and Commerce stated:

> Although the word "option" is not explicitly included in the definition of "security," a call option on a security is a "right to purchase" a security and both put and call options [on] securities are considered instruments "commonly known as" securities.

H.R. Rep. No. 626, 97th Cong., 2d Sess. Part 1 at 3 (1982). The House Committee also stated its belief that the decision by the Court of Appeals below "is not consistent with long-standing Congressional intent that the SEC has the sole authority to regulate options on all securities, including exempted securities. *Id.* at 8. The Report of the Senate Committee on Banking, Housing, and Urban Affairs similarly stated that the "comprehensive authority [of the SEC] to regulate securities extends to put and call options on securities" and that options "currently are considered to be within the definitions of 'security' " in the federal securities laws. S. Rep. No. 390, 97th Cong., 2d Sess. 3, 5 (1982).

[20] *See* 1 L. Loss, *Securities Regulation* 469 (2d ed. 1961) ("A call is a 'right to . . . purchase' a security within the literal language of the definition; but a put is a right to *sell*. At the same time, both types of option are such an integral part of securities trading that it seems entirely reasonable to subsume them under the phrases 'investment contract' and 'interest or instrument commonly known as a "security." ' " (Emphasis in original)).

exempted securities. Only a limited number of exempted securities—GNMAs and certain Treasury securities—are "commodities" under the CEA and, even under the Court of Appeals holding, the CFTC would have no jurisdiction to regulate options on any other security. The holding below thus creates a startling regulatory gap—neither the SEC nor the CFTC would have jurisdiction to regulate transactions in options on any other exempted security, and such options would totally escape federal regulation.

III.

INSTEAD OF DRAWING THE CLEAR AND SIMPLE JURISDICTIONAL LINE INTENDED BY CONGRESS, THE COURT OF APPEALS HOLDING FASHIONS AN AMBIGUOUS AND UNCERTAIN JURISDICTIONAL TEST THAT NEEDLESSLY REQUIRES AN AD HOC DETERMINATION OF JURISDICTION IN VIRTUALLY EVERY FUTURE CASE.

As noted above, the CEA grants the CFTC exclusive jurisdiction "with respect to accounts, agreements (including . . . an 'option' . . .), and transactions *involving contracts of sale of a commodity for future delivery.*" (Emphasis added). It also provides that, except for such exclusive jurisdiction of the CFTC, the SEC's jurisdiction is not to be limited or superseded by the CEA. As a result, the critical question presented to the Court of Appeals was whether the language italicized above should be interpreted to make the exclusive jurisdiction clause apply only to options to purchase or sell a futures contract or whether it should be interpreted to sweep within the clause any option having any relationship to a futures contract.

The narrower interpretation—that "involving" was intended, in the case of options, to pertain only to options to

purchase and sell a futures contract[21]—draws a clear and definitive jurisdictional line which can be readily applied and understood in all cases. That interpretation is consistent with the line drawn by the two agencies in their jurisdictional agreement. (*See* p. 6, *supra*). It is also consistent with the CFTC's own use of the words "involving contracts for future delivery"[22] and the analysis by the CFTC's present Chairman and by other leading commentators.[23]

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[21] The antecedent of "involving" in Section 2(a)(1) is "accounts, agreements (including . . . an 'option' . . .), and transactions." Given those words, Congress obviously had to use a word such as "involving" which, by its very breadth, would sensibly fit all of them in relation to the following phrase: "contracts of sale of a commodity for future delivery." But it does not follow that Congress meant to sweep into the CFTC's exclusive jurisdiction every option having any relationship to a futures contract. With respect to options, a narrow reading of "involving" is the most natural: an option obviously "involves" whatever is the underlying security or product that is subject to the option—in this case, a futures contract.

[22] In the announcement of its new regulations governing options on futures contracts, the CFTC stated:

> The Commission [CFTC] stated in its proposal that it believed that "priority should be given to adopting and implementing regulations which will permit trading of commodity options *involving contracts for future delivery.*" 46 FR at 33294. The proposed rules therefore did not specifically provide for the exchange trading of *options on actual commodities* . . . .

46 Fed. Reg. 54500, 54501 (1981) (emphasis added). This statement makes clear that the CFTC regards the phrase "involving contracts for future delivery" as including only options on futures.

[23] Philip Johnson, then outside counsel to CBT and now Chairman of the CFTC, analyzed the scope of the CFTC's exclusive jurisdiction over options as follows:

> The CFTC's exclusive jurisdiction, however, did not extend to *securities* options such as those traded on the Chicago Board Options Exchange or the American Stock Exchange, since such options, when exercised, do not result in the delivery of a futures contract.

Johnson, *The Commodity Futures Trading Commission Act: Preemption As Public Policy*, 29 Vand. L. Rev. 1, 15 n.45 (1976) (emphasis in original). As the dissenting opinion below notes, other commentators have consistently construed the exclusive jurisdiction clause to reach options on futures, but not options on the underlying instruments. *See* App. A-68–A-69 and the materials there cited.

More importantly, it is consistent with the repeated expressions by Congress that it did not intend to vest the CFTC with authority over securities options. Thus, the Senate Agriculture and Forestry Committee Report stated that the CFTC

> would not have the authority to regulate trading in puts and calls for securities. Where traded on exchanges, these puts and calls are regulated by the Securities and Exchange Commission.

S. Rep. No. 1131, 93d Cong., 2d Sess. 26 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 5843, 5866. To make the point even more explicit, the Senate Report also stated that the CFTC "will have exclusive jurisdiction over options trading in commodities (*but not in securities*)." *Id.* at 31, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 5870 (emphasis added). These statements and other similar statements from the legislative history compiled in the dissenting opinion below (App. A-80–A-83) show that Congress intended to draw a clear and simple jurisdictional line, with options on futures contracts subject to the jurisdiction of the CFTC and options on securities subject to the jurisdiction of the SEC.

The Court of Appeals majority rejected these authorities and adopted a broad interpretation of the CFTC's exclusive jurisdiction based entirely on its expansive reading of the word "involving" as meaning something like "having an economic relationship to." (App. A-17–A-21; A-28–A-32).[24] The basis on which the majority below reached this conclusion is obscure. Nothing in the statute or in the materials cited by the majority requires that result. Thus, it cited the fact that the words "relating to" had appeared in an earlier draft of the bill (App. A-19–A-20), even though those words were later dropped from the final version of the law and the draft bill that did contain these words also contained a provision expressly reserving *all* of the SEC's jurisdiction without

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[24] The dissent aptly observed that the "majority's almost total reliance on the word 'involving' in the exclusive jurisdiction clause to bear the crushing burden of options on actuals is to rest the Rock of Gibraltar on a toothpick." (App. A-69).

regard to the "exclusive jurisdiction" vested in the CFTC;[25] it cited a law review article as authority for its interpretation of the word "involving" (App. A-19), but it rejected a direct statement appearing in that same law review article that concluded that the exclusive jurisdiction clause did not apply to options on securities (App. A-19 n.18);[26] and it relied on a statement in a Senate Report suggesting that the CFTC was to have exclusive jurisdiction over "commodity options" (App. A-20), but it ignored its own statement that the term "commodity options" was used ambiguously in the legislative history to mean either options on futures or options on the underlying instruments (App. A-21), and it rejected other statements appearing in the same Senate Report explicitly indicating Congress' intention that the CFTC was not to have authority to regulate options on securities (App. A-22–A-24).[27] Nevertheless, relying on these three citations, the majority concluded that the CFTC's exclusive jurisdiction extended to options on securities.

Since any security could become a "commodity" under the majority's literal reading of the CEA (App. A-10), this overly broad interpretation of the majority could potentially sweep *all* securities options into the CFTC's exclusive jurisdiction. Even the majority recognized that there must be some limits (App. A-21–A-29), since the Congressional sponsors of the 1974 amendments to the CEA had expressly stated that the "limited" grant of exclusive jurisdiction to the CFTC

> was not intended, however, to apply to trading in interests and rights traditionally known as securities, including, for example, stocks, corporate bonds, warrants, and debentures, nor was it intended to apply to trading in options to purchase any of the foregoing.

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[25] H.R. Rep. No. 975, 93d Cong., 2d Sess. 87 (1974).

[26] *See* Johnson, *The Commodity Futures Trading Commission Act: Preemption As Public Policy*, 29 Vand L. Rev. 1, 15 n.45, quoted *supra* at n.22. Also *see* App. A-68 n.4.

[27] These are the statements appearing at p. 19, *supra*.

120 Cong. Rec. 34737 (1974) (explanatory statement of House Agriculture Committee Chairman Poage); 120 Cong. Rec. 34997 (1974) (identical statement of Senate Agriculture and Forestry Committee Chairman Talmadge). This led the majority to suggest that the grant of exclusive jurisdiction might not apply in cases involving options on "traditional" securities or on securities that are not "legitimate" commodities although neither term appears in the statute, but it put this question off to the future. (App. A-27–A-29).

As a result, the Court of Appeals majority holding gives no guidance as to whether options on any security other than GNMAs are within the CFTC's exclusive jurisdiction. For example, although certain securities issued by the Department of the Treasury are now commodities under the CEA, it would seem clear, under any conceivable standard, that Treasury securities are "traditional" securities, since they have been in existence almost as long as this nation and were among the first securities to be traded on this nation's securities exchanges. Similarly, AT&T corporate bonds would clearly seem to be "traditional," but the holding below leaves open whether jurisdiction over options on such bonds would flow from the SEC to the CFTC if and when they became the subject of futures contracts.[28] These uncertainties are compounded by the fact that, under the majority decision, the application of the "involving" test in the exclusive jurisdiction clause is to be based on factual determinations (App. A-27–A-32), which will necessarily differ from security to security. Thus, instead of fixing a simple and clear jurisdictional line, the holding below fashions a test that will lead to needless and continuing litigation to determine jurisdiction for options on every security that is or becomes a commodity.

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[28] Compare, for example, the suggestion in footnote 2 of the majority opinion in No. 81-1660 that even futures contracts in stocks and stock options might be traded on the CBT under the CEA (App. A-6 n.2) with the majority's suggested limitation with respect to options on "traditional" securities (App. A-27).

Even in those situations in which it may be clear at a given time that options on a particular security are subject to regulation under the securities laws, that regulatory scheme would be subject to being displaced under the holding below if, as a result of action by a commodity board of trade, that security were to become subject to futures trading. For example, CBOE's stock options have long been subject to SEC jurisdiction, but, subject to the vagaries inherent in the majority's use of the words "traditional" and "legitimate," the SEC's jurisdiction might be immediately displaced if trading in futures contracts on underlying stocks were permitted to commence or if the stock options should otherwise be held to "involve" futures contracts. This constant threat of regulatory disruption—whereby conduct that is legal and properly regulated under one federal statute at one moment could become illegal and regulated under a different statutory scheme at the next moment—creates intolerable uncertainty for the public, the securities industry and the courts.

CONCLUSION

The Court of Appeals has erroneously decided important questions of federal law which should be reviewed and settled by this Court. Petitioners respectfully request that a writ of certiorari issue to review the judgments of the Court of Appeals for the Seventh Circuit.

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